83-935

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA

v.

JOHN CLYDE ABEL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a witness may properly be impeached by showing that he and the party for whom he testifies belong to a group whose members are sworn to commit perjury on each other's behalf.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 707 F.2d 1013.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983, and amended on June 6, 1983. A petition for rehearing was denied on September 7, 1983 (App., *infra*, 11a). Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including December 6, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, respondent

was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and sentenced to 25 years' imprisonment (App., *infra*, 1a).[1] A divided panel of the court of appeals reversed his conviction.

1. On September 8, 1981, four men robbed the Bellflower Savings and Loan Association in Bellflower, California (1 Tr. 123-128, 131; 2 Tr. 190-192; GX 11, 12).[2] A witness observed the license number of the getaway car, a white Camaro, and the FBI determined that the car was registered to Anna Sainz (1 Tr. 130-131; 2 Tr. 194; GX 9, 10, 18).

Later that day, several members of the Los Angeles County Sheriff's Office interviewed Sainz at her home (2 Tr. 202-203, 206-261, 284). She told the officers that she had loaned the car that morning to respondent, who had left in it with her housemate Ronald Gremard and another man (2 Tr. 195, 198, 208, 214-215). She said that respondent and Gremard had later returned the car and departed again in respondent's Ford pickup truck (2 Tr. 198-202). Sainz expected them both to return that evening (2 Tr. 201). The officers searched the house with Sainz's consent and found a bank bag in one of the bedrooms (2 Tr. 263-265, 285; GX 2). They then awaited the return of respondent and Gremard (2 Tr. 265-269, 275-276).

After dark, respondent and Gremard returned to the house in a Ford pickup truck and were arrested (2 Tr. 202-203, 205-206, 265-269, 275-276). The officers seized

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[1] Ronald Gremard and Kurt Edward Ehle, who were indicted together with respondent, pleaded guilty. As part of his plea bargain, Ehle testified for the government (App., *infra*, 2a).

[2] Bank employees and a bank visitor identified respondent from a photo spread as one of the armed robbers who appears in a bank surveillance photograph (1 Tr. 71-73, 79-80, 87-89, 105-108, 121-122, 136-138, 140-141, 143, 150, 152-153; 2 Tr. 229, 308-311; GX 16).

some clothing from the seat of the pickup (2 Tr. 286-287, 291-292; GX 8). A search of respondent's person at the police station where he was taken uncovered a bait bill from the Bellflower Savings and Loan and eight Susan B. Anthony silver dollars alleged to have been taken in the robbery (1 Tr. 113-115; 2 Tr. 288-290, 292-293; GX 3, 4, 23-A).

At trial, Kurt Ehle, one of respondent's codefendants, testified for the government and implicated respondent as one of the bank robbers. Respondent called Robert Mills to impeach Ehle. Mills, who was imprisoned with Ehle and respondent and had been friendly with them both, testified that Ehle had said that he intended to give false testimony identifying respondent as one of the robbers in order to obtain a more lenient sentence. App. A, *infra*, 4a. Before cross-examination began, the prosecutor informed the court, out of the presence of the jury, that he intended to examine Mills about his membership in the "Aryan Brotherhood."[3]

Defense counsel objected on narrow grounds. She conceded that Mills's membership in the Aryan Brotherhood was relevant but stated (3 Tr. 388-389):

> I think, your Honor, it would be relevant, but only as far as asking, for example, "Isn't it true that you belong to an organization where you try to protect each other?," or "Isn't it true that you belong to an organization that you would be willing to lie for another member?" I think that's the farthest that something like that should be allowed to get to, but not the mention of "Aryan Brotherhood" or

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[3] The Aryan Brotherhood is "a white supremacist prison gang." *United States* v. *Mills*, 704 F.2d 1553, 1555 (11th Cir. 1983), petition for cert. pending, No. 83-5286.

any other organization that has the type of connotations that the Aryan Brotherhood has.

* * * * *

Your Honor, I think * * * it's too prejudicial to be allowed in a trial.

The court then held that the evidence was admissible and that its probative value outweighed any possibility of prejudice (3 Tr. 389-390).

Before cross-examining Mills on this subject, the prosecutor requested a side-bar conference and outlined the questions he proposed to ask (3 Tr. 437). Defense counsel responded (*ibid.*) that "the U.S. Attorney may perhaps get into whether they belong to any organization," but she objected to any "reference to the Aryan Brotherhood or * * * any kind of motto * * *."[4] The court therefore ruled (3 Tr. 438) that the prosecutor should refer to a "secret prison organization" rather than naming the Aryan Brotherhood. Although this ruling appeared to eliminate defense counsel's sole ground for objection, she objected without explanation when Mills was asked the following questions (3 Tr. 439-440):

Q Mr. Mills, do you belong to any secret type of prison organization which is restrictive somewhat in its membership?

A No, I don't.

Q Do you belong to any secret-type organization which has as part of its creed or tenets or oath of that organization that the members thereof will first of all deny they belong to that secret organization?

A No, I don't.

* * * * *

[4] The prosecutor's offer of proof indicated that the organization's motto is "Blood in, blood out," which means that "[t]he only way you get out of it is to get killed and the only way you get into it is either kill somebody yourself or be present when somebody is killed and participate in it." 3 Tr. 367, 370. This evidence was not introduced.

Q And do you belong to any secret organization which has as part of its creed that those members who belong to it will lie to protect the members that are in that secret organization, prison organization?

A I know of no organization like that.

In rebuttal, the government called Ehle, who testified that both Mills and respondent were members of a secret prison organization whose members were pledged to deny the organization's existence and to "lie, cheat, steal [and] kill * * *" to protect other members (App., *infra*, 6a; 3 Tr. 504). Defense counsel stated (3 Tr. 505) that she objected "under [Fed. R. Evid.] 403 and 608" but did not elaborate.

The judge offered upon request to instruct the jury not to consider Ehle's testimony for any purpose other than assessing Mills's credibility. Respondent did not request such an instruction. 3 Tr. 413-414.

2. A divided court of appeals reversed respondent's conviction.[5] Conceding that a trial court has broad discretion to admit or exclude evidence (App., *infra*, 6a), the court of appeals nevertheless held that the trial judge had committed reversible error by allowing Mills

[5] The court of appeals upheld the denial of respondent's motion to suppress the money found on his person after his arrest (App., *infra*, 2a-3a). The court held that the sheriff's officers had probable cause to arrest respondent and that the search was properly made incident to arrest (*ibid.*). For the same reason, the court upheld the denial of respondent's motion to suppress the shirt found on the seat of the pickup (*id.* at 3a n.1).

Because of its disposition of the impeachment issue, the court of appeals did not decide whether the trial judge erred in refusing to permit respondent to call an alibi witness whose name did not appear on respondent's notice of intention to offer an alibi defense (*id.* at 4a).

to be impeached by proof that he and respondent belonged to a group whose members were sworn to commit perjury on each other's behalf (*id.* at 5a).

Observing that the government may not convict an individual merely for belonging to an organization that advocates illegal activity (*Scales* v. *United States*, 367 U.S. 203, 219-224 (1961); *Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969)), the majority reasoned (App., *infra*, 5a):

> Neither should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value. It establishes nothing about the individual's own actions, beliefs or veracity.

The majority added that the "suggestion of perjury, based purely on a group tenet, without any showing that Mills personally accepted such a tenet, * * * makes such testimony unacceptable" (*id.* at 6a). The court also found that the rebuttal testimony had unfairly prejudiced respondent "by mere association" (*id.* at 7a).

Judge Kennedy dissented (*id.* at 8a-10a). He stated (*id.* at 8a) that "[t]he line of questioning barred by the majority in this case is akin to inquiry respecting family ties, prior business relations, or the myriad other past or present associations that may cause a witness, consciously or otherwise, to color his testimony. There is consensus that such matters are admissible, as probative on the issue of bias." He added (*ibid.*) that "if the tables were turned and a key prosecution witness were a member of a gang such as the one here, I should think it would be error to reject defense efforts to show bias through gang membership. See *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974) * * *."

Judge Kennedy found *Scales* and *Brandenburg* inapposite because "[t]hey stand only for the proposition that membership alone is not sufficient for the imposition of a penalty" and do not preclude consideration of

membership in assessing a witness's possible bias (App., *infra*, 9a). He elaborated (*ibid.*): "The witness who is impeached by membership in a group sworn to perjury is subject to no sanction other than that his testimony may be disbelieved."

Judge Kennedy stated (*id.* at 10a) that a trial judge has discretion to admit extrinsic evidence showing bias, and he concluded (*ibid.*) that the trial judge in this case had not abused that discretion in holding that the probative value of Ehle's testimony outweighed the possibility of unfair prejudice to respondent.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case is a startling departure from settled law regarding proof of a witness's bias. No authority supports the court's holding that a witness may not be impeached by showing that he and the party on whose behalf he testifies belong to the same group, let alone a group whose members are sworn to commit perjury on each other's behalf. Common sense indicates that such membership may have an important bearing on a witness's credibility. Not only is the decision below contrary to established law and reason, but it may greatly hamper efforts to combat the increasing number of crimes committed by tightly-knit prison gangs, terrorist groups, and other similar organizations. Review by this Court is therefore warranted.

1. The importance of evidence of a witness's bias is well recognized. As this Court has stated: "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' " *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974), quoting 3A Wigmore, *Evidence* § 940, at 775 (Chadbourn rev. ed. 1970). Accord, 3 Weinstein & Berger, *Weinstein's Evidence* ¶ 607[03], at 607-30 to 607-32 (1982); *McCormick on Evidence* § 40, at 78 (2d ed. 1972); 3 Louisell & Mueller, *Federal*

Evidence § 341, at 470 to 484 (1979). Indeed, that is precisely what respondent was doing in calling Mills to testify about Ehle's motive for testifying against respondent, and no one could seriously suggest that such evidence was inadmissible.

There also is little doubt that evidence of membership in a group may be relevant to show bias. As one leading commentator puts it (3 Weinstein & Berger ¶ 607[03], at 607-30 to 607-32) (footnotes omitted): "Relationships between a party and a witness are always relevant to a showing of bias whether the relationship is based on ties of family, sex * * *[,] employment, business, friendship, enmity or fear." Another commentator states (*McCormick on Evidence* § 40, at 78 (2d ed. 1972)):

> Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility. The kinds and sources of partiality are too infinitely varied to be here reviewed * * *.

See also 3 Louisell & Mueller, *Federal Evidence* § 341, at 470-484; 3A Wigmore, *Evidence* § 949, at 784-786.

Proof of bias "is never considered collateral: Extrinsic evidence of bias, or of facts from which it may be inferred, may be introduced even after the witness has denied the bias, or the facts, on cross-examination." 3 Louisell & Mueller § 341, at 470-471 (footnote omitted); see also, *e.g.*, *United States* v. *Frankenthal*, 582 F.2d 1102, 1106 (7th Cir.1978); *United States* v. *Moore*, 554 F.2d 1086, 1091 n.34 (D.C. Cir. 1976); *United States* v. *Brown*, 547 F.2d 438, 445-446 (8th Cir.), cert. denied, 430 U.S. 937 (1977); *United States* v. *Harvey*, 547 F.2d 720, 722 (2d Cir. 1976).

These rules are based upon "the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties." *McCormick on Evidence* § 40, at 78. Common sense and experience suggest that a witness will tend to give testimony favorable to a party he likes and unfavorable to a party he dislikes.

Thus, any evidence from which partiality may be inferred—including common membership in a group— is important in assessing a witness's credibility.

Tempering the rule permitting proof of a witness's bias is the recognition that "the trial judge may * * * in both civil and criminal cases, impose reasonable limits upon attempts to show bias in the interest of preventing harassment of witnesses, unfair prejudice to parties, confusion of issues, or undue consumption of time, all pursuant to Rules 403 and 611 [of the Federal Rules of Evidence]." 3 Louisell & Mueller § 341, at 471-473 (footnote omitted).

2. In departing from these black letter rules, the court of appeals reasoned (App., *infra*, 5a) that since "the government may not convict an individual merely for belonging to an organization that advocates illegal activity * * * [n]either should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value."

The court confused two fundamentally different concepts: those facts that may be made a crime and those facts that may be considered in determining whether a crime has been committed. For example, it is obvious that characteristics such as race, gender, and age may not be made a crime. But there is no doubt that such characteristics may be proved in criminal trials where relevant. For instance, race or gender may be relevant to identification, and age may be relevant if physical strength is at issue. Proof of group membership stands on the same footing. Even though mere membership generally may not be made a crime, membership may be proved where relevant, including where relevant to show bias.

The court of appeals' reasoning suggests that evidence bearing upon a witness's credibility may not be admitted unless it is sufficient to prove a criminal of-

fense. That principle would revolutionize the law of evidence and lead to patently absurd results. For example, under present law a witness may be impeached by proof of his reputation for untruthfulness (Fed. R. Evid. 608(a)) even though persons may not be convicted solely because of their reputations. Likewise, although family relationships are not a crime, it is universally recognized that a witness may be impeached by showing that he or she is related to one of the parties. Under the court of appeals' reasoning, all this would have to change. For example, since motherhood is not a crime, it would seem to follow that a jury could not be permitted to learn that the sincere and convincing witness who testified for the defense was in fact the defendant's mother.

The court of appeals' pivotal pronouncement that "membership, without more, has no probative value" is equally wrong. In a trial for murder resulting from a rifle shot fired at long range, would the defendant's membership in a rifle club have "no probative value?" In a trial for counterfeiting, would membership in a printer's union be irrelevant? Proof of membership alone might not be conclusive, but it would surely be relevant, *i.e.*, "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (Fed. R. Evid. 401).

The court of appeals suggested (App., *infra*, 6a) that its decision was necessary to protect Mills's freedom of association. However, even if membership in a prison gang were protected by the First Amendment (see *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 125-133 (1977)), the effect upon First Amendment interests in the present case was surely no greater than when a witness is impeached by proof of family relationship. If First Amendment associational rights are not abridged by proof that a witness is married to the

party for whom he or she testifies, we fail to see how Mills's or respondent's First Amendment rights were violated in this case by proof that they belonged to the Aryan Brotherhood.

As Judge Kennedy pointed out in dissent (App., *infra*, 8a), if Mills had been a prosecution witness (for example, in a case brought against a member of a rival prison gang charged with having assaulted respondent), it would almost certainly have been error to preclude the defense from showing that Mills and respondent belonged to a group whose members are expected to commit perjury for each other. See *Davis* v. *Alaska*, 415 U.S. at 316-317. There is no reason why defense witnesses should be treated any differently. If, for example, both sides in a criminal trial called members of gangs with tenets similar to the Aryan Brotherhood's (a realistic possibility in light of the proliferation of antagonistic prison gangs), it would be a travesty if the defense could attack the credibility of prosecution witnesses by proving their group membership while the government was barred from introducing similar evidence regarding the defense witnesses.

In part, the court of appeals appears to have objected to proof of Mills's membership in the Aryan Brotherhood because that evidence was *too probative* regarding his credibility. The court wrote (App., *infra*, 6a):

> Ehle's testimony was not simply a matter of showing that Abel's and Mills' membership in the same organization might "cause [Mills], consciously or otherwise, to color his testimony." *See* dissent at [App., *infra*, 8a]. Rather it was to show as well that because Mills and Abel were members of a gang whose members "will lie to protect the members," Mills must be lying on the stand.

This reasoning is especially faulty. Although members of fraternal organizations, country clubs, alumni associations, professional groups, and most other organizations are not sworn to lie for each other, evidence

of membership in such organizations is admissible to show bias because the trier of fact is permitted to infer that the witness's testimony may be slanted in favor of a fellow member. In this case, the trier of fact was not called upon to infer from simple shared membership in a prison gang that Mills may have slanted his testimony to protect a fellow member. Rather, that evidence bearing quite rationally on Mills's credibility was reinforced by direct evidence showing essentially what the trier of fact would have been permitted to infer from the bare fact that Mills and respondent both belonged to the same group.

The court of appeals' decision, insofar as it appears to turn on the higher probative value of evidence of preagreement to commit perjury, leaves an irrational hole in the permitted methods of establishing a witness's bias. Presumably the court would have allowed the admission of evidence showing that Mills himself had expressed an intent to lie to protect respondent or other members of the Aryan Brotherhood, and the court distinguished the present case from those in which mere group membership is shown and the trier of fact is left to infer that the witness might slant his testimony in favor of a fellow member. If bias may properly be shown in these ways, we fail to see why it may not be established by the evidence introduced in this case.

3. As previously noted, while evidence of bias is always relevant, trial judges have discretion to exclude such proof if its probative value is "substantially outweighed by the chance of unfair prejudice, confusion of the issues, or misleading the jury * * *." Fed. R. Evid. 403; see also Fed. R. Evid. 611. In this way, any unfairness to the defendant may be prevented.

In the present case, the district court carefully balanced the relevant factors and decided not to exclude the proof. The court did, however, prohibit mention of the Aryan Brotherhood's name and offered to give a

limiting instruction. As Judge Kennedy concluded in dissent (App., *infra*, 10a), the district court's rulings were well within its discretion.

4. The court of appeals decision conflicts with *United States* v. *Bufalino*, 683 F.2d 639, 646-647 (2d Cir. 1982). The defendant in that case was charged with attempting to arrange for the murder of a witness against him. The government's theory was that the defendant could prevail upon a fellow prisoner to commit the murder because "both were members of La Cosa Nostra, an organization whose members performed murders for one another as a matter of professional courtesy" (683 F.2d at 647). On direct examination, the defendant claimed that his acquaintance with the other prisoner was based on "chance meetings" (*ibid.*). The court of appeals held (*ibid.*) that it therefore "became proper for the government to impeach him by introducing evidence of [his] longstanding relationship with La Cosa Nostra" (*ibid.*). Similarly, in the present case, when Mills denied belonging to a secret prison organization whose members are sworn to lie on each other's behalf, it became proper to impeach him by introducing evidence of his membership in such a group.

The court of appeals' decision in this case also is inconsistent with the Eleventh Circuit's reasoning in *United States* v. *Mills*, 704 F.2d 1553 (1983), petition for cert. pending, No. 83-5286, another case involving the Aryan Brotherhood. In *Mills* the defendant[6] was charged with murdering a fellow prison inmate. The prosecution's theory was that the murder was the re-

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[6] The defendant in *Mills* is not the same person who testified for respondent in this case. However, Robert Eugene Mills, the defense witness in the present case, is a respondent in *United States* v. *Gouveia*, cert. granted, No. 83-128, (Oct. 17, 1983. Testimony regarding Abel's membership in the Aryan Brotherhood was adduced in that trial. See 4 Tr. 562-564, filed in *United States* v. *Mills*, No. CR-80-0278-WPG (C.D. Cal. Jan. 12, 1982).

sult of a "contract" put out by the Aryan Brotherhood to avenge cheating in a drug transaction. Upholding the admission of testimony on the organization, history, and activities of the Aryan Brotherhood, the court wrote (704 F.2d at 1559):

> To make the crime comprehensible to a jury it was necessary for the government to show how the Aryan Brotherhood functioned, that Mills was a member of the Aryan Brotherhood, that an affront to a fellow member might serve as an adequate motivation for Mills to kill a person whom he barely knew, and that it was possible for a member of the Brotherhood incarcerated in one federal prison to communicate the murder contract to another member in a different prison, despite mail censorship and restrictions on inter-inmate correspondence.

The court also upheld the admission of testimony of government witnesses concerning "their intense, deathly fear of the Aryan Brotherhood" (*id.* at 1560). The court found that this testimony was properly admitted to counter defense efforts "to impeach the credibility of the government witnesses by proving that they had agreed to testify falsely for the government to manipulate their way into the 'country club' conditions of the Witness Protection Program" (*ibid.*).

Mills concededly did not involve the admission of evidence of group membership to show bias on the part of a witness. Instead, proof that the defendant belonged to the Aryan Brotherhood, as well as evidence of that group's organization, history and activities, was admitted to show motive and opportunity and for other accepted purposes. But if proof of group membership may be admitted for these purposes without abridging associational rights, we fail to see why it may not also be admitted to show bias in accordance with long-established principles of the law of evidence. It therefore seems most unlikely that respondent's conviction would have been reversed by the *Mills* court, which

upheld the admission of voluminous evidence regarding the Aryan Brotherhood—evidence with far more inflammatory potential than that in the present case.

5. The decision below may significantly hamper the government's efforts to combat organized criminal activity. Prison gangs like the Aryan Brotherhood are responsible for an increasing volume of crimes committed both within and outside prisons. These and other tightly-knit, disciplined, criminal groups pose a serious public danger and present particularly difficult problems for law enforcement. In cases involving such organizations, proof of group membership is often of great relevance, either to show bias or for other accepted purposes. If the associational rights of group members preclude such proof, as the decision below suggests, prosecution of group members will be rendered far more difficult. Fellow members will be able to lie to protect each other, and the government will be barred from proving group membership or showing that group members are sworn to commit perjury on each other's behalf. Significant danger to the public may result.

In addition, there is nothing about the decision of the court of appeals, when set against the general principles of the law of evidence, that confines its reach to impeachment of defense witnesses. The same principles would equally govern defense efforts to show bias on the part of prosecution witnesses. The court of appeals' decision thus promises to sow great confusion among the lower courts and threatens serious abridgement of defendants' rights as well as those of the prosecution. Prompt correction of the error of the court of appeals is therefore required.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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DECEMBER 1983

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 81-1666

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

JOHN CLYDE ABEL, DEFENDANT-APPELLANT.

Argued and Submitted Oct. 6, 1982

Decided May 20, 1983.

As Amended June 6, 1983.

Appeal from the United States District Court for the Central District of California.

Before KENNEDY, TANG and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

In 1981 defendant John Abel was indicted for armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d). He was convicted by a jury and sentenced to a term of twenty-five years. He appeals the conviction on three grounds: first, that the district court improperly denied his motion to suppress evidence seized at the time of his arrest; second, that the court impaired his ability to present witnesses; and third, that the court improperly allowed the introduction of inflammatory references to a secret prison organization for purposes of impeachment. Because we agree that the district court abused its discretion in allowing the inflammatory secret prison organization references, we reverse the conviction and remand to the district court for a new trial.

FACTS

On September 8, 1981, the Bellflower Savings and Loan Association in Bellflower, California was robbed by four white males. A witness gave the FBI the li-

cense number of the getaway vehicle, a white Camaro, which was found to be registered to Anna Sainz.

That same day, several members of the Los Angeles County Sheriff's Office went to Sainz's home and interviewed her there. She informed the officers that she had loaned the car to John Abel that morning. Her housemate Ronald Gremard, Abel and another man left in the Camaro. Abel and Gremard later returned the car to the house and left again in Abel's Ford pickup truck; she expected both of them to return that evening. With Sainz's permission, the officers searched the house, finding a bank bag in one of the bedrooms. Several officers then waited inside the home, while others were stationed outside.

When Gremard and Abel arrived at the house in a Ford pickup, it was dark. Gremard entered the residence and was arrested there. Abel followed more slowly, putting on a shirt while walking toward the house. He was arrested before reaching the unlighted porch. The officers then seized some clothing from the seat of the pickup. Abel was taken to the police substation and searched there. The search revealed $434.50, including a bait bill from the Bellflower Savings and Loan, and eight silver dollars alleged to have been taken in the robbery.

Abel, Gremard, and Kurt Edward Ehle were indicted for the robbery. Gremard and Ehle both pled guilty, but Abel went to trial. Ehle agreed to testify for the government as part of his plea bargain, and did so. Defendant Abel was convicted and this appeal ensued.

I. DEFENDANT'S MOTION TO SUPPRESS

Abel assigns as error the trial court's denial of his motion to suppress the money, including a "bait bill," seized from his person after his arrest. The trial court found that probable cause existed for Abel's arrest and that the search of his pockets was lawful as incident to that arrest. We agree.

At the time that Abel alighted from the pickup truck and began walking toward Anna Sainz's front door, the officers had already interviewed Sainz and searched the residence. Sainz had told them that Gremard and Abel had returned to her house earlier in the getaway vehicle. At that time Gremard had left behind a flannel shirt which the officers found in an upstairs bedroom, wrapped around a white bank bag containing $149.95 in dimes, quarters and half dollars. Abel and Gremard had then left in Abel's Ford pickup, and Sainz expected them to return that evening to take her to dinner. Under these circumstances, the officers had probable cause to believe that the two men who drove up to Sainz's residence, in a truck matching her description, at the time she expected them to come had committed a felony earlier that day. *See United States v. Bernard*, 623 F.2d 551, 558-59 (9th Cir.1980), *quoting Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). The combination of poor lighting and the fact that Abel's face was obscured by the shirt he was donning may have made it impossible for the officers to visually identify him. However, they had sufficient cause to arrest him regardless.

Because Abel's arrest was valid, a search of his person was authorized. "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 39 L.Ed.2d 427 (1973). The search of Abel's pockets and wallet at the station was likewise valid. *See United States v. Ziller*, 623 F.2d 562, 563 (9th Cir.1980). The court therefore did not err in denying Abel's motion to suppress the evidence found in that search.[1]

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[1] Abel also moved to suppress the blue plaid shirt taken from his pickup truck. The trial court allowed the shirt into evidence on alternate grounds of search incident to arrest or "plain

II. EXCLUSION OF TESTIMONY

As required by Fed.Rule of Crim.Proc. 12.1(a), Abel gave written notice of his intention to offer an alibi defense, which included his intention to call his employer Vito Spillone as an alibi witness. No other alibi witnesses were listed.

At trial, Abel sought to have the company bookkeeper, Linda Taylor, testify with regard to the business telephone records of Angie's Wholesale. The district court refused to allow Taylor to testify, ruling that since she was an alibi witness, prior notice to the government was required. Fed.R.Crim.P. 12.1(a).

Because we reverse the conviction on the ground of improper impeachment, we need not decide this issue. At the new trial, the government now has notice of the witness and the issue will not arise again.

III. IMPEACHMENT BY ASSOCIATION

Kurt Ehle testified for the government that Abel had been one of the bank robbers. The defense called Robert Mills to impeach Ehle. Mills had been in prison with Ehle and Abel and had been friendly with both of them at various times. Mills testified that Ehle had told him that Abel was not in fact one of the robbers, but that he (Ehle) intended to identify him as such in order to obtain a shorter sentence for himself. The prosecution was permitted to cross-examine Mills on his alleged membership in a "secret type of prison organization" whose members would "lie to protect the [other] members." Mills denied membership in, or knowledge of, such an organization.[2]

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view." Abel has not specifically attacked this ruling as it applies to the shirt. Because we find that probable cause existed for Abel's arrest, a contemporaneous search of the passenger compartment of the truck he had recently exited is authorized by *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981).

Abel's final allegation of error is, in essence, that the court allowed defense witness Mills to be impeached by association. We believe it to be a fundamental tenet of our criminal justice system that guilt or innocence, credibility or lack thereof, are personal, and cannot be established by evidence that a person merely belongs to a particular group, whether that group is ethnic, political, religious or social in character, and whether such membership is inherent or a matter of choice. It is settled law that the government may not convict an individual merely for belonging to an organization that advocates illegal activity. *Scales v. United States*, 367 U.S. 203, 219-24, 81 S.Ct. 1469, 1481-83, 6 L.Ed.2d 782 (1959); *Brandenberg v. Ohio*, 395 U.S. 444, 448, 89 S.Ct. 1827, 1830, 23 L.Ed.2d 430 (1969). Rather, the government must show that the individual knows of and personally accepts the tenets of the organization. Neither should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value. It establishes nothing about the individual's own actions, beliefs or veracity.

In this case the prosecutor was permitted to engage in the following colloquy:

> Q: Mr. Mills, do you belong to any secret type of prison organization which is restrictive somewhat in its membership?
>
> A: No, I don't.

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[2] Out of the hearing of the jury, the prosecutor stated his intention to cross-examine Mills on his membership in the "Aryan Brotherhood." Recognizing the possible prejudice associated with the name of the group, the court ruled that no specific references would be permitted, but suggested that the prosecutor refer to it as a "secret prison organization."

Q: Do you belong to any secret-type organization which has as part of its creed or tenets or oath of that organization that members thereof will first of all deny they belong to that secret organization?
A: No, I don't.
Q: And do you belong to any secret organization which has as part of its creed that those members who belong to it will lie to protect the members that are in the secret organization?
A: I know of no organization like that.

The government then recalled Ehle as a rebuttal witness. Ehle testified that Mills and Abel were both members of a secret prison organization whose members would deny its existence and would "lie, cheat, steal, kill . . ." to protect other members.

A trial court does, of course, have broad discretion to admit or exclude evidence, *United States v. Larios*, 640 F.2d 938, 941 (9th Cir.1981). This discretion does not, however, extend to allowing impeachment by association. If the government had sought to impeach Mills on the ground that he belonged to a fraternal organization, and called a witness to testify that such members believe they should lie to protect other members, the court would not have admitted such testimony; similarly it should not have admitted the evidence here. Ehle's testimony was not simply a matter of showing that Abel's and Mills' membership in the same organization might "cause [Mills], consciously or otherwise, to color his testimony." *See* dissent at 1017. Rather it was to show as well that because Mills and Abel were members of a gang whose members "will lie to protect the members," Mills must be lying on the stand. It is this suggestion of perjury, based purely on a group tenet, without any showing that Mills personally accepted such a tenet, that makes such testimony unacceptable. By allowing Mills' testimony to be impeached purely on

the ground that he belonged to an organization that allegedly advocates perjury, with no evidence that Mills *himself* had ever expressed a willingness to lie, the court committed error.

In this case the error was reversible because Ehle's testimony implicated the defendant also as a member of the alleged organization. Since the defendant had not testified in his own behalf, this testimony was clearly not offered for impeachment purposes and served only to prejudice the defendant, again by mere association. This was reversible error.

Accordingly, we REVERSE and REMAND to the district court for a new trial.

KENNEDY, Circuit Judge, dissenting:

This case announces a rule that is incorrect and most unfortunate. It reverses a conviction because of a question I should have thought relevant and proper in any sensible legal system. The court holds that a jury may not be told that both a witness and the defendant for whom he vouches belong to a prison gang bound by oath to lie on each others' behalf in open court, because, without more, that affiliation is not probative of the witness' credibility.

The line of questioning barred by the majority in this case is akin to inquiry respecting family ties, prior business relations, or the myriad other past or present associations that may cause a witness, consciously or otherwise, to color his testimony. There is consensus that such matters are admissible, as probative on the issue of bias. *See* 3 J. Weinstein & M. Berger, Evidence § 607[03] (1982 & Supp.982); 3A J. Wigmore, Evidence § 949 (J. Chadbourn rev. 1970 & W. Reiser Supp.1982). Even with respect to the sensitive area of religion, the Advisory Committee's notes to the Federal Rules of Evidence make it clear that evidence of membership, if relevant to bias, is admissible. Fed.R.Evid. 610 advisory committee note. Indeed, if the tables were turned and a key prosecution witness were a member of a gang such as the one here, I should think it would be error to reject defense efforts to show bias through gang membership. *See Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974); *see generally* Weinstein, Evidence § 607[03].

I respectfully submit it is a mistake to require that routine bias questions meet the constitutional standards for proof of guilt in a criminal proceeding based on associational activity. The majority announces a sweeping prohibition against attempts to establish bias based upon a witness' membership in any organization or

group, relying solely upon a Smith Act case and a criminal syndicalism case. *Scales v. United States*, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Even assuming *Scales* and its progeny have some relevance to the case before us, and I submit they do not, those cases do not prohibit all inferences from the fact of membership. They stand only for the proposition that membership alone is not sufficient for the imposition of a penalty, an issue not present in this case. The inference that a member of a cultist, disciplined prison gang might tend to color his testimony respecting another member from the same prison is a sensible conclusion of the sort used by men and women in their ordinary affairs, and the trier of fact ought to be able to draw it here.

Elementary evidentiary probes similar to those at issue here do not chill or infringe the constitutional right of free association. The first amendment concerns addressed in *Scales* and alluded to by the majority do not arise in the context of cross-examination of a witness as in this case. The witness who is impeached by membership in a group sworn to perjury is subject to no sanction other than that his testimony may be disbelieved. He may respond to the inquiry by either a confirmation or denial of membership, and his answers can be given appropriate weight by the trier of fact. Counsel for the defendant, moreover, may ask further questions in order to correct any misleading inferences. Any danger that such questioning might mislead the jury or prejudice the defendant may be considered by the trial judge under Fed.R.Evid. 403, which is addressed to precisely such matters.

It was proper for the Government to call Ehle to rebut Mills' denial of membership in the prison gang. With the exception of prior criminal convictions, extrinsic evidence of specific instances of conduct ordinarily

may not be introduced to attack or support a witness' credibility. Fed.R.Evid. 608(b); *United States v. Wood*, 550 F.2d 435, 441 (9th Cir.1976). Ehle's testimony in this case, however, goes not to Mills' general character for truthfulness or lack thereof, but to his particular bias or motive for testifying as he did. The bias or interest of an important witness is not collateral or irrelevant, and it is well-settled that extrinsic evidence is admissible, in the trial court's discretion, on that issue. *Barnard v. United States*, 342 F.2d 309, 317 (9th Cir.), *cert. denied*, 382 U.S. 948, 98 S.Ct. 403, 15 L.Ed.2d 356 (1965); *United States v. James*, 609 F.2d 36, 46 (2d Cir.1979), *cert. denied*, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980); 3 J. Weinstein & M. Berger, Evidence § 607[03] (1982 & Supp.1982).

Of coure, Ehle's rebuttal testimony also suggested that Abel himself belonged to the secret prison organization, which was prejudicial to him. Before allowing that testimony, the district court gave the matter particularly careful consideration, and dutifully performed on the record the required balancing of probative value and prejudicial effect. We accord such determinations of admissibility considerable deference on appeal, and will reverse them only for an abuse of discretion. *United States v. Palmer*, 691 F.2d 921, 923 (9th Cir.1982). There is nothing in the record of this case to suggest that the district court abused its discretion or that its determination should be overturned. To the contrary, the district court's consideration of the matter was thorough, deliberate, and well-reasoned. The Government's inquiry into Mills' connection to the secret prison organization and Ehle's rebuttal testimony were entirely permissible.

I would affirm the conviction.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-1666
DC No. CR 81-880-MML

[Sept. 7, 1983]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JOHN CLYDE ABEL, DEFENDANT-APPELLANT.

ORDER

Before: KENNEDY, TANG and FERGUSON, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.